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# National membership models in a multi-level Europe

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## **Abstract**

Through two interwoven sections, the paper explores some empirical dimensions and theoretical challenges related to the granting of electoral rights resident non-nationals by states and by the European Union. The objective is to develop approaches to models of membership which in turn enrich citizenship studies in the European Union context, offering an approach to studying EU citizenship which is firmly rooted in national constitutional discourses and practices. The focus in the first substantive section is upon electoral rights granted to EU citizens under Article 19 EC, which allow the nationals of Member States to vote in European Parliament and local elections when resident in a host Member State, under the same conditions as nationals. We then explore in the second substantive section some membership models which suggest how Member States might be able to develop defensible approaches to the challenges of determining the boundaries of the franchise in the complex multi-level euro-polity.

## **I Introduction**

This paper explores some of the constitutional tensions in a multi-level Europe which result from the establishment of citizenship of the Union through the Treaty of Maastricht, which came into force in 1993. The citizens of the Union are, under Article 17 of the EC Treaty, the nationals of the Member States of the European Union, and according to that same provision Union citizenship is complementary to national citizenship and shall not replace it. Yet, as the Court of Justice would have it, “Union citizenship is destined to be the fundamental status of nationals of the

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Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.”<sup>2</sup>

The Court’s conclusion – while decidedly aspirational rather than empirical in character – nonetheless reinforces the point that, in legal terms, equal treatment for Union citizens is at the very heart of the concept of Union citizenship as established under the treaties. This is clear from the text of the EC Treaty itself, especially the provisions relating to electoral rights for non-nationals, which are the empirical focus of this paper (Article 19 EC). Moreover, the equal treatment aspect of citizenship of the Union has received substantial attention since the late 1990s, both in the case law of the Court of Justice<sup>3</sup> and in scholarly commentaries, many of which have focused on the rights of mobile Union citizens when resident in other Member States.<sup>4</sup> In that context, much of the scholarly work has addressed Union citizenship in a manner which divorces it almost completely from the national context in which it is most strongly rooted. This is all the more surprising since Union citizenship is clearly a very limited concept when compared to national citizenship, as it primarily protects only free-moving citizens and leaves essentially untouched the lives of the majority “static” citizens.<sup>5</sup> Such work typically considers Union citizenship solely in the context of the dynamics of European integration and, when moving into the normative register in order to ask the question “what kind of citizenship for what kind of European Union?”, rapidly reaches the limits of what is possible using legal or (positive) constitutional analysis. For while there are a number of important constitutional questions which need to be addressed about what should be the condition of citizenship under conditions of polity building beyond the state, the

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<sup>2</sup> Case C-184/99 *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-La-Neuve* [2001] ECR-I 6193 at para. 31.

<sup>3</sup> Case C-85/96 *Martínez Sala v. Freistadt Berlin* [1998] ECR-I 2691; Case C-209/03 *R v. London Borough of Ealing, ex parte Bidar* [2005] ECR I-2119; Case C-224/98 *D’Hoop v. Office National de l’Emploi* [2002] ECR I-6191; Case C-353/08 *Grunkin and Paul v. Grunkin-Paul and Standesamt Stadt Niebüll*, judgment of 14 October 2008.

<sup>4</sup> G. Davies, “‘Any Place I Hang My Hat?’ or: Residence is the New Nationality”, (2005) 11 *European Law Journal* 43-56; D. Kochenov, “*Ius Tractum* of many faces: European Citizenship and the Difficult relationship between status and rights”, (2009) 15 *Columbia Journal of European Law* 169-237; F. Jacobs, “Citizenship of the European Union: A Legal Analysis”, (2007) 13 *European Law Journal* 591-610; J. Shaw, *The Transformation of Citizenship in the European Union*, Cambridge, 2007, Chapter 3.

<sup>5</sup> Eurostat Statistics in Focus, *Recent migration trends: citizens of EU-27 Member States become ever more mobile while EU remains attractive to non-EU citizens*, 98/2008.

answers to such questions generally lie either in the realm of political decision-making by the Member States and – ultimately – their electorates, or in the realm of normative political theory.<sup>6</sup>

In this paper, we argue that such approaches underplay two elements which are central to understanding the complex role which citizenship is playing within the evolving constitutional framework of what may be termed the composite Euro-polity, which comprises both the EU and its Member States. First, insufficient attention has been paid to the constitutional implications for the Member States of the operation of concepts and practices of citizenship, both national and European, across the horizontally and vertically differentiated sites of legal and constitutional authority which together make up the complex Euro-polity. In this paper, using the example of political participation rights for non-citizens, we will attempt to identify some of the principal constitutional impacts of the new form of supranational citizenship brought into being by the Treaty of Maastricht in the 1990s. In a second stage, the argument is then developed that these changes and impacts demand that the Member States re-evaluate the role of citizenship within national (constitutional) discourse in order to develop reasonably consistent and defensible models of membership, which can give effective expression to the iterative and evolving nature of the relationship between national and EU level citizenship rights. Using once again the example of political participation rights, we present a classification of potential membership models, premised upon common themes in citizenship discourse and normative theories of citizenship as membership, as a starting point from which to show how national citizenship models might develop as part of a process of re-rooting concepts of European citizenship more closely within national constitutional frameworks.

## ***II Political participation rights for non-citizens as a constitutional challenge***

A number of tensions are associated with the task of determining the personal scope of voting rights in liberal constitutional democracies. The first concerns the question of determining “who decides who decides”? If the boundaries of the suffrage are

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<sup>6</sup> M. Aziz, “Implementation as the Test Case of European Citizenship”, (2009) 15 *Columbia Journal of European Law* 281-298.

embedded in the constitutive documents of a given polity, then it may be assumed as a starting point that they have received some form of popular approval. But by whom should approval be given? If it is the same group of persons approving the constitutive documents who are then given rights to vote in subsequent elections under those self-same documents, then an essentially circular situation of “infinite regress” arises “since any group of citizens taking such a decision would again have to prove that it includes all who can legitimately participate in this decision”.<sup>7</sup> This argument leads naturally on to consideration of the membership models developed more extensively in the following section, which suggest consistent principles for determining who can participate in democratic procedures. As we shall see such principles may suggest both more liberal principles than currently exist in many polities on access to national citizenship and – potentially – a willingness to extend the right to participate beyond the confines of legal membership in certain circumstances, in order to include resident non-nationals within (some aspects of) the franchise. The second tension therefore concerns the complex interrelationship between the right to vote and the rules governing the acquisition of national citizenship. This is an issue which becomes particularly acute where there are high levels of population mobility, such as is facilitated by the European Citizens’ right to free movement within the Union, since restrictive rules on the acquisition of national citizenship combined with restrictive rules on the franchise can result in large numbers of non-citizen residents being disenfranchised even though they are affected in more or less exactly the same way by laws which are adopted as are those who are citizens.<sup>8</sup>

In practice, while very few polities have reacted to the democratic imperatives to which this paradox of inclusion and exclusion gives rise by according electoral rights to non-citizen residents in national or regional or state-level elections in advance of the acquisition of national citizenship, quite a number of states have granted the right to vote in local or municipal elections to lawfully resident non-nationals, often once they have satisfied a qualifying residence period. In the case of the EU Member States, those states which granted local electoral rights to all non-citizen residents quite apart from the imperatives of EU law (i.e. before they were required to do so in

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<sup>7</sup> R. Bauböck, “Global Justice, Freedom of Movement and Democratic Citizenship”, *Arch.europ.sociol.*, 1 2009 1 at 16.

<sup>8</sup> See also below n.41.

respect of EU citizens) are the three Nordic states (Denmark, Finland and Sweden), the Netherlands and Ireland. For the first four of those states, policies on electoral rights were also related to broader state approaches to the challenge of integrating long term resident non- nationals. The adoption of such policies also reflect that those four states are also amongst the few which have ratified the most pertinent international instrument in this field, the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level.<sup>9</sup> A number of other states have subsequently granted voting rights to third country nationals under the shadow of the imperatives of EU law as well as those of integration (Belgium, Luxembourg), and it was the shadow of EU membership which, in different ways, motivated the extension of local electoral rights to non-citizen residents in a number of the post-2004 Member States (Estonia, Lithuania, Hungary, Slovakia and Slovenia). Just to complete the picture, a number of states have limited voting rights for certain groups of third country nationals (e.g. the UK grants voting rights in all elections to Commonwealth citizens), including cases demanding reciprocity from third states such as Portugal, Spain and the Czech Republic. In the latter two cases, instances of third country national voting rights are more or less theoretical, although Spain is currently developing treaties with a number of South American countries in order to expand the list of states whose citizens enjoy reciprocity beyond one: Norway. The other Member States do not accord any electoral rights to third country nationals.

But of course it is the case of EU electoral rights themselves which is the most significant instance of a complete network of electoral rights binding together twenty seven states, and covering both the municipal elections organized by each Member State as well as the elections for the EU's own democratically elected body, the European Parliament. Article 19 EC provides that in both cases nationals of the Member States, in their capacity as EU citizens, have the right to vote and to stand for such elections under the same conditions as nationals. The provisions do not provide for voting rights as such, although in two recent cases on the scope of the right to vote in European Parliament elections the Court seemed to suggest that the right to vote in

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<sup>9</sup> ETS No. 144; opened for signature on 5 February 1992; entered into force 1 May 1997; [www.conventions.coe.int/](http://www.conventions.coe.int/).

European Parliament elections is an implicit citizenship right of EU citizens,<sup>10</sup> albeit one which Member States may also choose to allow third country nationals to exercise as well, at least so far as this accords with their constitutional traditions, as is the case in the UK which allows Commonwealth citizens to vote in all elections, including European Parliament elections.<sup>11</sup> As mandated in Article 19 itself, directives adopted by the Council of Ministers lay down more detailed rules, such as those needed to implement the principle that EU citizens may not vote twice in European Parliament elections, even if they are allowed to vote as expatriates in their home state. They must choose to vote *either* in the home state *or* in the host state, and Member States should take the necessary steps to enforce this and prevent double voting.<sup>12</sup> These directives also allow for derogations from the normal rules in the case where “the proportion of citizens of the Union of voting age who reside in [the host state] but are not nationals of it exceeds 20% of the total number of citizens of the Union residing there who are of voting age”, through the application of qualifying residence periods of up to five years in the case of the right to vote and ten years in the case of the right to stand for election.<sup>13</sup> In practice, such derogations, which were originally foreseen in Article 19 itself, are only possible for Luxembourg, which has a non-national EU citizen population of around 30%, partly because of the presence of EU institutions on its territory, and partly because of a historic migration of Portuguese citizens to work in Luxembourg.<sup>14</sup> Such derogations are also, of course, highly controversial because they mean that precisely in circumstances where the proportion of non-national EU citizens is high enough to be a significant electoral constituency, its participation can be restricted by national rules on qualifying periods which are precisely the types of restrictions which Article 19 and the directives are supposed to sweep away, by deeming residence in another Member State to be qualifying residence where Member States impose such conditions on their own nationals.

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<sup>10</sup> Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag (Aruba)* [2006] ECR I-8055.

<sup>11</sup> Case C-145/04 *Spain v. United Kingdom (Gibraltar)* [2006] ECR I-7917.

<sup>12</sup> Council Directive 93/109/EC, OJ 1993 L329/34 (European Parliament elections); Council Directive 94/80/EC, OJ 1994 L368/38 (local elections).

<sup>13</sup> Article 12 of the local elections directive; Article 14 of the European Parliament elections directive.

<sup>14</sup> See S. Besch, “Les candidates portugaises aux élections locales luxembourgeoises”, (2004) *Cahiers de l’Urmis*, no. 9, February, 77-87 at 78-79.

Although the rules on electoral rights and the electoral practices at the national and – where necessary – transnational level needed to give effect to Article 19 EC are by now well established, with four sets of European Parliament elections and numerous local elections having taken place, the levels of take up of the right to stand and to vote in the Member State of residence remain rather low. In a sense, they magnify the general tendency for turn out in European Parliament elections and in local elections to be lower than for national elections. The reasons for low take up are not particularly related to problems of formal legislative compliance. The most significant problem with this came in Belgium, which took until 1998 to adopt the amendments to the national constitution needed to allow non-nationals to vote in local elections. By that stage, the Commission had lost patience and brought an enforcement action against Belgium before the Court of Justice.<sup>15</sup> The Court's judgment is extremely perfunctory. There was no doubt that Belgium was not in compliance, having failed to adopt the necessary constitutional amendments or implementing legislation, and its excuse for not doing so, namely political difficulties associated with bringing the necessary legislation through the convoluted Belgian constitutional amendment process, cannot be cited as defenses to an action brought under Article 226 EC.<sup>16</sup> The judgment was, therefore, more or less a formality.

Belgium was only one of many Member States which had to introduce constitutional amendments in order to give effect to Article 19 EC.<sup>17</sup> In the main, this task was undertaken at the time when other constitutional amendments were adopted in order to give permit national ratification of the Treaty of Maastricht (e.g. Germany), or as part of the process of national constitutional adjustment to membership for those states which have joined the Union since 1993 (e.g. Austria and Poland). Clearly, where a constitution of a Member State either explicitly limits the right to vote and to stand for election to those with national citizenship, or implicitly links notions of national and political membership, it will require amendment in order to permit the state to comply with its obligations under EU law. This point can best be illustrated not so much by the amendments introduced to the various national constitutions in order to accommodate the Maastricht citizenship provisions which, with the exception

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<sup>15</sup> Case C-323/97 *Commission v. Belgium* [1998] ECR I-4281.

<sup>16</sup> J. Shaw, *Law of the European Union*, 2<sup>nd</sup> Edition, Palgrave, 2000, at 310-311.

<sup>17</sup> For a discussion of Ireland, Spain and the Netherlands, see S. O'Leary, *The Evolving Concept of Community Citizenship*, Kluwer, 1996, at 219-233



of the Belgian case, proceeded without great difficulties, but rather by reference to debates at the national level about extensions of the franchise which go beyond the scope of EU law. To put it another way, it is not the constitutional adjustments made to the national membership models in order to accommodate EU law which have generated the most interesting debates, but rather those which accompany decision-making about extending local electoral rights to third country nationals or about granting national electoral rights to resident non-citizens (or indeed non-resident citizens, although the issue of expatriate voting will not be discussed further in this paper<sup>18</sup>).

Four key examples will be given in order to illustrate these debates. We will begin with the judgments of the German Federal Constitutional Court declaring unconstitutional legislative attempts made by two *Länder* in the late 1980s to introduce voting rights in municipal elections for non-citizens, and then look briefly at the judgment of the Austrian Constitutional Court in 2004 on the unconstitutionality of laws introduced by the Vienna City Government to give voting rights in elections for the lowest level of municipal government to third country nationals which took a similar approach to the issue of construing constitutional provisions relating to the concept of the national people. The primary distinction between the cases is temporal: the German cases date from the pre-Maastricht days, whereas the Austrian case was decided under the shadow of already existing EU electoral rights, as well as a much larger corpus of EU law specifically related to the status of third country nationals adopted under Title IV of Part Three of the EC Treaty. We then turn to look at the introduction of voting rights in elections for the lower house of the Irish Parliament (the *Dáil*) for UK citizens resident in Ireland, and an associated judgment of the Supreme Court holding that such a measure required a prior constitutional amendment, and then – reversing the lens as it were – we finally examine the debate – which has not thus far resulted in legislative action – about retrenching the scope of voting rights for non-nationals in the UK, limiting these only to UK citizens and those rights which are required by EU law.

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<sup>18</sup> For more detail on the political inclusion of expatriates see R. Bauböck, “Stakeholder Citizenship and Transnational Political Participation: A normative evaluation of external voting”, 75 *Fordham Law Review* 2393-2447.

In 1990, the German Federal Constitutional Court handed down two rulings, annulling as unconstitutional two legislative schemes introduced at the level of the *Land* by the states of Hamburg and Schleswig-Holstein which would have given electoral rights in local municipalities to non-nationals who satisfied certain types of criteria regarding residence and attachment to the host state.<sup>19</sup> As the basis for its rulings, the Court relied upon a concept of popular sovereignty as the basis for political legitimacy and linked this to a principle of a bounded *Staatsvolk* (or “state people”), marked out by reference to the holding of national citizenship. It explicitly rejected the principle of affected interests as the basis for a claim to political equality and access to the franchise. Its key conclusion reads as follows:

“The principle [of popular sovereignty] in Article 20(2) of the Basic Law does not mean that the decisions engaging state authority must be legitimated by those affected by them; rather state authority must be based on a people understood as a group of persons bound together as a unity.”<sup>20</sup>

It extended its conclusion about “state” authority also to the level of local democracy, holding that municipalities, like the elected authorities at the state and federal level, wield state power. At the time, the Court made clear that any measures introduced to give voting rights to EU citizens (by that stage in view, as the case was decided as the negotiations for the Treaty of Maastricht proceeded) would require constitutional amendment which were duly introduced in the context of the subsequent ratification process. It also pointed in the direction of the loosening of the rules on citizenship acquisition as another means of ensuring that pluralist political representation and voice is assured in a more diverse Germany, with large numbers of residents not qualifying for German citizenship under the historically restrictive conceptions which applied up to, and beyond, the date of reunification, but which have since been somewhat loosened.<sup>21</sup>

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<sup>19</sup> BVerfGE 63, 37 (Schleswig-Holstein); BVerfGE 63, 60 (Hamburg), 31 October 1990.

<sup>20</sup> BVerfGE 63, 37 at 50 (our translation).

<sup>21</sup> Gesetz zur Reform des Staatsangehörigkeitsrechts of 15 July 1999 (BGBl. I, p.1618). Further detail below, n. 44. For analysis of the substantial shift in Germany policy see H. Hoffmann, “The Reform of the Law on Citizenship in Germany: Political Aims, Legal Concepts and Provisional Results”, (2005) 6 *European Journal of Migration and Law* 195-203.

An important element of the conclusion reached by the Court was that it was not possible for the *Länder*, within the limits of their legislative competences related to the organisation of elections at the substate level, to open up the debate on electoral rights by that legislative means. While there may have been a political consensus in those two *Länder* to widen the boundaries of the suffrage, through the enfranchisement of long term resident non-citizens, but the implementation of this political consensus was blocked by a constitutional framework which could only be altered by a national political consensus, and – even then – probably only within certain limits. For example, it is not clear whether the central and unalterable norms of the German constitution would in fact permit the inclusion of EU citizens at some point in the future in the national or *Land*-level electoral franchise. For the ruling is based upon a link between the nature of the state and its democratic legitimacy which is premised on the existence of the *Staatsvolk*, not upon an idea that democratic legitimacy could flow from consent being given by those who are affected by any given decisions. Thus while it is possible to see, as Seyla Benhabib has suggested, the subsequent amendments to the law on national citizenship, including allowing nationals of other Member States the possibility of being dual nationals, as part of a series of “democratic iterations” involving other political and legal forces such as political parties, groups representing immigrants in Germany, and the legislative organs of the state,<sup>22</sup> it is also clear that certain core constitutional norms could, paradoxically, place a restriction on democratic possibilities. Germany would, on this argument, cease to be Germany if its legitimation no longer flowed from the *Staatsvolk*. This conclusion is consistent with another controversial ruling of the Federal Constitutional Court in the early 1990s, namely its ruling on the ratification of the Treaty of Maastricht. This likewise highlighted the constitutional limits of democratic choice in Germany, stating that while the Treaty of Maastricht itself was consistent with the Basic Law (subject to a number of amendments that had to be introduced, not least for the purposes of giving effect to Article 19 EC), there were steps along the route towards closer integration that it might not be possible to take given the limits of permissible constitutional amendments. This is in particular so because of the lack of a single European people, since democracy comes from the

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S. Benhabib, *The Rights of Others*, Cambridge, 2004, at 207.

people.<sup>23</sup> The creation of a legal framework whereby the Member States all agreed to give voting rights in national and regional elections to long term resident non-national EU citizens, whether through an extension of Article 19 EC or by means of some type of reciprocal scheme outside the framework of the Treaties,<sup>24</sup> might simply not be a constitutional possibility for Germany.

Austria has also seen a constitutional controversy over voting rights for third country nationals in recent years, specifically in the city of Vienna. In 2002, the ruling social democratic city government in Vienna reached an agreement with the Green Party over a commitment to introduce electoral rights for third country nationals. An opinion poll was conducted amongst potential third country national voters on behalf of the city government, and this showed that 70 per cent of the potential voters said they would use the vote if granted it. This suggested that the vote in municipal elections for third country nationals could effectively be seen as part of a larger integration strategy, binding the non-nationals closer to the Austrian state and public authorities.<sup>25</sup> Amendments were introduced to the relevant Viennese electoral law to allow for voting by third country nationals with five or more years of residence in the so-called *Bezirksvertretungen*. These community councils are the levels at which EU citizens also participate in municipal governance within Vienna, since the Vienna city council doubles as a *Land* parliament and thus is excluded from the scope of the Article 19 voting rights. Such councils below the level of the city do not exist elsewhere in Austria and are not mentioned at any point in the Austrian Constitution. This gave rise to the argument that the constitutional restrictions limiting voting in other elections to citizens (with only the exceptions required for EU citizens) would not extend to the *Bezirksvertretungen*. When opposition politicians took the legislation before the constitutional court, this argument was dismissed, and the court adopted a narrow interpretation of the constitutional possibilities under Austrian law, cutting off what had been put forward as a promising experiment to see whether third country national voting could contribute to the integration process in Austria.<sup>26</sup>

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<sup>23</sup> Brunner [1994] 1 CMLR 57 at 87 (unofficial translation).

<sup>24</sup> See Shaw, *Transformation*, above. n.4 Ch. 6.

<sup>25</sup> A. Krahler and S. Sohler, *Active Civic Participation of Immigrants in Austria*, Country Report prepared for the European research project POLITIS, Oldenburg, 2005 at 52; see [www.uni-oldenburg.de/politis-europe/](http://www.uni-oldenburg.de/politis-europe/).

<sup>26</sup> VfGH 20 June 2004, G218/03.

Drawing on what Bernhard Perchinig has described as an ethos of nineteenth century nationalism,<sup>27</sup> the Court decreed that the rules on the franchise for the national, provincial and municipal levels of government are merely a specific example of the general principle stated in Article 1 of the Constitution, whereby “Austria is a democratic Republic. Its law stems from the people.” This “people” is the Austrian people, defined by citizenship. It applied that argument also to the *Bezirksvertretungen*, concluding that they are general representative bodies established by law to deal with matters in the public interest, not in the interests of particular groups or professions and to fulfil a function as representative organs of a defined territorial entity. Consequently, the principle of the homogeneity of the franchise must apply to them, even though in reality the “people” or *Volk* which can vote for the *Bezirksvertretungen*, like the *Gemeinderäte* in the rest of the country, is constituted by Austrian citizens plus resident EU citizens from other Member States. thus the Court gave no intrinsic weight to the redefinition of the “people” in terms of the impact of EU law, other than to recognize the single exception mandated by Article 19 EC. It stated that the exception to Article 1 brought about in order to give effect to Austria’s membership of the European Union, whereby the law stems not only from “the people”, but also from the “organs of the (European) Community”, was “irrelevant” in this context.<sup>28</sup> Critics such as Perchinig have deplored the failure to refer to the emergence of a distinctive concept of EU citizenship as being relevant to the evolution of the concept of the “people” for the purposes of a case like this, and *a fortiori*, the failure to recognize that EU law itself has started to impact upon the status of third country nationals.<sup>29</sup> Notably, in the Tampere Programme in 1999, the ideal was articulated that third country nationals should, so far as possible, receive a package of rights and benefits which equated to the treatment of second country nationals, i.e. EU citizens. In reality, this objective is far from being achieved, but even so, there is sufficient case to question whether, in those circumstances, we should begin to see some cross-fertilization between these ideas, and the concept of a “national people” as articulated very strongly by the Austrian constitutional court. On

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<sup>27</sup> B. Perchinig, “Blocked by Constitution: How the Constitutional Court Stopped Municipal Voting Rights for Third Country Nationals in Vienna”, paper prepared for the ESF/LESC-SCSS Exploratory Workshop on “Citizens, Non-Citizens and Voting Rights 2005, at 10.

<sup>28</sup> VfGH 20 June 2004 at 48.

<sup>29</sup> Presidency Conclusions, Tampere European Council, 19-20 October 1999; see Shaw, *Transformation* at 219-222.

the contrary, the court re-emphasized that naturalization is the only route to political inclusion in Austria.

The last two examples (UK and Ireland) may be considered together. The Representation of the People Act 1918 established the first truly democratic franchise for the Westminster parliament in the United Kingdom, abolishing property qualifications for men and introducing the franchise for (some) women for the first time. The franchise was, at the time, given to “British subjects”, there being then no modern conception of British citizenship. When Ireland and what are now the countries of the Commonwealth became independent states at various points during the twentieth century, the franchise arrangements were preserved and updated.<sup>30</sup> The relevant consolidating legislation laying down the general entitlement to vote is the Representation of the People Act 1983, as amended.<sup>31</sup> In this political sense, neither Irish nor Commonwealth citizens are treated as “aliens”, although in the case of the latter group the right to vote and to stand<sup>32</sup> in any elections in the UK is subject to immigration status. Only persons who are “qualifying”, in the sense of not requiring leave to enter or remain, or having been granted it, are able to vote and to stand. For Maltese and Cypriot citizens, who are both Commonwealth citizens and EU citizens, this qualification does not apply, as indeed it does not for Irish citizens. European-ness or EU citizenship – and the free movement rights associated with it – takes precedence over Commonwealth-ness, in that sense. A further notable peculiarity of the UK system of voting rights is that because the local electoral register is nominated as the reference point for the franchise for elections to the devolved bodies in Scotland, Wales and Northern Ireland, EU citizens resident in the those parts of the UK have the right to vote for those bodies.<sup>33</sup> Given the quasi-federal nature of the

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<sup>30</sup> See, for example, the Ireland Act 1949.

<sup>31</sup> For more details on all UK elections see House of Commons Library Standard Note, “Electoral Franchise: Who Can Vote?,” SN/PC/2005, 1 March 2005.

<sup>32</sup> The right to stand for election is covered by the Act of Settlement 1700, although the issue of immigration status is dealt with by the Electoral Administration Act 2006, s18. See House of Commons Library Standard, “The Franchise and Immigration Status”, SN/PC/419, 11 October 2005, House of Commons Library Research Paper 05/65, “The Electoral Administration Bill 2005”, October 2005.

<sup>33</sup> S 3(1) of the Local Government Elections Regulations 1995 (SI 1995, no 1948) provides the basic amendments to the local electorate to incorporate the requirements of EU law; in relation to the inclusion of EU citizens in the ‘regional’ franchise see s17 of the Greater London Authority Act 1999; s11 of the Scotland Act 1998; s10 of Schedule 1 of the Government of Wales Act 1998; s2(2) of the Northern Ireland (Elections) Act 1998. For further discussion, see J Shaw, ‘Political Rights and Multilevel Citizenship in Europe’, in E

UK, and the fact that the Scottish Parliament at least has the power to adopt primary legislation, this is a unique scenario within the Member States, where EU citizens have – more as a result of bureaucratic convenience and perhaps the search to emphasize the local element of devolution than as a result of principled political decision – acquired the right to participate in elections which shape in very significant ways matters which are redistributive (e.g. education policy) or concern questions of personal status (e.g. family law). They are, in Scotland, part of an electorate that votes for an (albeit self-styled) “Government”.

It is worth mentioning that some degree of reciprocity exists between the voting rights of Irish citizens in the UK and those of UK citizens in Ireland. In 1985, after a Supreme Court case<sup>34</sup> which required this matter to be put before a referendum in order to effect a constitutional change, legislation was introduced to allow UK citizens to vote (but not stand) in *Dáil* (i.e. lower house) elections.<sup>35</sup> This was done in the name of reciprocity by the Irish Parliament. Bearing in mind that there are no elections to the upper house of Parliament in the UK, nor for the Head of State, it is understandable that voting rights were not given in elections for the *Seanad Éireann* and the President of Ireland to UK citizens. There is also a lack of parallelism in relation to referendums. Irish citizens may be able to vote in referendums in the UK, depending upon the legislation establishing both the question and the franchise,<sup>36</sup> but given the specific constitutional status and function of referendums in Ireland, where popular consent for constitutional change is formally built into the system, it is not surprising that UK citizens again are not permitted to vote.

A recent report on citizenship in the UK by Lord Peter Goldsmith, written at the behest of Prime Minister Gordon Brown as part of an enquiry into what “Britishness” means, suggested that there is a need to “make proposals for how to introduce greater

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Guild and S Carrera (eds), *Integration of Third Country Nationals and Illiberal Practices in the EU* (Houndsmills, forthcoming).

<sup>34</sup> *In the Matter of Article 26 of the Constitution and in the Matter of the Electoral (Amendment) Bill, 1983 [SC No. 373 of 1983] [1984] IR 268*

<sup>35</sup> Electoral (Amendment) Act 1985.

<sup>36</sup> E.g. the Government’s European Union Bill introduced into the House of Commons in 2005 and providing for a referendum on the Constitutional Treaty was based on, but went somewhat beyond, the Westminster franchise, as the basis for giving a right to vote (cl 7).

clarity to the ‘citizenship settlement’ between citizens and the state.”<sup>37</sup> One area for reconsideration, according to Goldsmith, is that of the franchise. He argued that “Voting in all elections, along with holding a passport, is the ultimate badge of citizenship. That view is reflected in the rules of most other countries around the world which do not permit anyone but citizens to participate – or to stand – in national or often even local elections. Clearly in the UK we do not have the same clarity around the significance of citizenship.”<sup>38</sup> He therefore went on to propose “that the government gives consideration to making a clear connection between citizenship and the right to vote *by limiting in principle the right to vote in Westminster elections to UK citizens*. This would recognise that the right to vote is one of the hallmarks of the political status of citizens; it is not a means of expressing *closeness between countries*. Ultimately, it is not right to give the right to vote to citizens of other countries living in the UK until they become UK citizens” (emphases added).<sup>39</sup> It is not explicit in the discussion in the body of the report, but is made clear in the executive summary,<sup>40</sup> that Goldsmith would propose narrowing UK voting rights down just to what is *required by EU law*, and no more. And yet it is clear from the material reviewed above that in more or less subtle ways the membership models operating in the UK and in Ireland have been remoulded to fit more closely to each other’s contours. It is hard to turn the clock back on “closeness between countries”, as Goldsmith appears to be suggesting in some ways as he acknowledges that rights cannot be removed once they have been accrued, although as the Irish rules operate on the premise of reciprocity, the voting rights for UK citizens would be rolled back in the event of removal of the franchise from Irish citizens in the UK. Moreover, as Goldsmith himself acknowledges, there are some complexities which stem from the peculiarities of the constitutional settlement in Northern Ireland which allows residents in Northern Ireland to choose to identify themselves as Irish or British (or indeed both). Thus Irish citizens connected to Northern Ireland who choose to carry Irish passports and not to have UK citizenship cannot be disenfranchised, as to do so would interfere with these delicate constitutional arrangements. And, moreover, Goldsmith makes no reference to the fact that the UK chooses to go beyond the strict scope of the Article 19 electoral

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<sup>37</sup> Lord Goldsmith QC, *Citizenship: Our Common Bond*, Citizenship Review, March 2008; available from <http://www.justice.gov.uk/reviews/citizenship.htm>, p12.

<sup>38</sup> Goldsmith, at 75.

<sup>39</sup> Goldsmith, at 75-76.

<sup>40</sup> Goldsmith, at 6.



rights, by extending the right to vote in elections to the devolved bodies, as we noted above.

### ***III National membership models***

We have seen, in these brief examples, evidence of the different ways in which national constitutional discourse responds, both directly and indirectly, to the types of specific challenges posed by citizenship of the Union and the more general challenges, at the level of membership models, of arguments about what the scope of the franchise is, and ought to be, in any given democratic polity.

We have seen that the grant of municipal voting rights to resident second country nationals has been incorporated into many Member State systems in which the franchise was previously reserved to nationals, as an *exception* necessitated by the external process of European integration. Several states have changed their national constitutions in order to facilitate an extension of the franchise in accordance with this obligation. This piecemeal development of national franchise laws to accommodate Union-level developments which could be seen at first blush as intrusive in states, giving rise to inconsistencies and disruption in national franchise systems previously based on exclusivity (e.g. Germany and Austria), or introducing additional layers of complexity in national systems where third country national voting rights in local elections have previously been granted on a universal basis, but only after certain qualifying periods which should be waived for second country nationals (e.g. Denmark and the Netherlands). The constitutional adjustment process has proved difficult in some cases (e.g. Belgium), and in the case of Luxembourg the very fact that EU citizens are present in large numbers and could therefore present a significant challenge within the system has proven sufficient reason effectively to deny the implementation of Article 19 EC. In a small number of cases (Ireland and the UK) states have already gone beyond what is strictly required by EU law in terms of rights for (some) EU citizens. This is one of the reasons why the UK which displays high levels of asymmetry both in relation to the rights granted and the patterns of elections in which those rights operate may face significant difficulties introducing future reforms, finding that the complex tissue of the franchise system begins to unravel if the national principle of allocation is reasserted in a manner which is excessively

simplistic. Finally, in all cases the operation of electoral rights for resident EU citizens operates within a wider framework of rights for nationals themselves, including rights to vote in national elections denied to almost all EU citizens, including – in many cases – voting rights for non-resident citizens.

The process of re-rooting the study of European citizenship within national constitutional discourse is therefore necessary to facilitate a broader exploration of the nuanced relationship between domestic and European-derived rights in nested polities than can otherwise be achieved within the limited framework of European citizenship as an adjunct to European integration. As illustrated in the previous section, this process highlights apparent tensions between national constitutional models and models of democratic inclusion required by the goal of European citizenship.

Facilitated migration for EU citizens within the Union and the attached voting rights contained in Article 19 EC not only raise questions of the reasoned basis for inclusion of resident EU nationals (temporary or otherwise) within certain strands of the demos, but also highlight the tensions within national policies that restrict admission and conferral of rights of nationals of non-EU countries.<sup>41</sup> The fact that national policies often sit uneasily alongside the European provisions in turn raises questions about the basis upon which Member States determine the boundaries of democratic inclusion, suggesting that the cohesiveness of national policy may benefit from a reconsideration of national membership models against the broader landscape of European integration.

Accordingly, the following section will present a classification of possible normative models of membership according to which the franchise can be allocated, premised upon key citizenship themes. These models have the benefit of addressing the questions of justification at the root of delineation of the boundaries of the demos, thus mitigating the challenge to liberal democratic ideals posed by the operation of a privileged class of individuals receiving preferential rights of access and participation. However, these models are still largely prescriptive in character and none are given effect in entirety by any Member State. Three of the four models to be examined argue towards the allocation of greater voting rights to resident non-nationals than any

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<sup>41</sup> Above n.8.

Member State currently affords. Nonetheless, the value of this exercise lies in considering models that attempt to make sense of the complex patterns of constitutional relationships identified in the previous section, thus paving the way for the future development of national constitutional practices that give full effect to the democratic principles upon which they are founded.

The classification presented below will consider four models of membership that delineate the boundaries of the demos according to key citizenship themes and characteristics. The four membership models to be considered are ethnic nationalism, affected interests, stakeholder and social membership/domicile. It will be contended that national constitutional principles founded upon a model of ethnic nationalism pose the greatest problem in interaction with European citizenship, and even when such policy operates in combination with greater access to naturalization the normative foundations remain incompatible with a thickened European social space. We will argue that the two preferential models best capable of accommodating the iterative relationship between European and national citizenship models are Rainer Bauböck's "stakeholder" citizenship model and Dora Kostakopoulou's a-national model of citizenship grounded upon domicile. Thus the value of the membership models proposed are evaluated not simply according to their own normative merits, but with regard to their ability to reconcile the specific constitutional challenges identified in the previous section.

i. Ethnic Nationalism

An ethnic nationalist membership model defines the polity by reference to shared descent and cultural affinity.<sup>42</sup> The political community is anterior to and independent of the boundaries of the nation state, defined by a common ethnic bond rather than any relationship with the state itself. Ethnic nationalism is in this sense a "non-territorial conception of the political community".<sup>43</sup> In this model of membership, nationality acquisition rules mirror the criteria of national belonging, and citizenship status becomes a proxy for ethnic membership.

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<sup>42</sup> R. Bauböck, "Stakeholder Citizenship and Transnational Political Participation: A normative evaluation of external voting", (2007) 75 *Fordham Law Review* 2393-2447 at 2414.

<sup>43</sup> Ibid.

Ethnic nationalist conceptions of citizenship were the driving force behind the formerly restrictive German nationality laws, according to which German citizenship was acquired almost exclusively by descent. In addition to this acquisition of citizenship through naturalisation was uncommon, being the “exception rather than the rule”.<sup>44</sup> These provisions had the effect that a large number of migrant workers and their descendents were excluded from German citizenship and could access only the limited franchise to which resident non-nationals were entitled. This problem is compounded by the high proportion of resident third country nationals in Germany (a large proportion of immigrants are of Turkish origin) and the lack of voting rights for non-EU nationals. The constitutional reform of 1999<sup>45</sup> made some moves towards relaxing the conditions of nationality acquisition in Germany, thereby improving enfranchisement rights for groups who had previously been classed as non-nationals. A limited principle of *jus soli* was introduced, according to which children born in Germany can acquire German citizenship if at least one parent has had a lawful and habitual residence in the country for at least 8 years, and holds a settlement permit or in the case of EU citizens is exercising her right to free movement.<sup>46</sup> The naturalisation process was also made easier, with non-nationals entitled to naturalisation after a lawful and habitual residence of 8 rather than 15 years.<sup>47</sup> These changes were implemented with view to facilitating nationality acquisition for migrant workers and their second and third generation descendants, and in turn increasing their rights of political participation.

A membership model grounded in ethnic nationalism advocates to a limited extent the enfranchisement of privileged groups of resident non-nationals who are granted the right to vote on the basis of ethnic ties. This is one way of conceiving of the right of Commonwealth citizens to vote in the UK.<sup>48</sup> A thick ethnic-nationalist membership model would however tie the legal citizenship status to ethnicity, with the result that, for example, Commonwealth citizens would be enfranchised as UK citizens rather than as a privileged class of non-nationals. Conversely, ethnic nationalism models of

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<sup>44</sup> R. Bauböck and others, *Acquisition and Loss of Nationality: Policy and Trends in 15 European Countries*, IMISCOE Research Series, AUP, 2006, at 213.

<sup>45</sup> Above n.21.

<sup>46</sup> R. Bauböck and others, *Acquisition and Loss of Nationality: Policy and Trends in 15 European Countries*, IMISCOE Research Series, AUP, 2006, at 213.

<sup>47</sup> Ibid.

<sup>48</sup> Above n.30.

democratic inclusion restrict the enfranchisement of resident non-nationals on grounds other than ethnic descent, supporting neither the enfranchisement of groups of resident non-nationals that are privileged on a political basis, either by reason of reciprocity or as a result of Union law, nor the general enfranchisement of resident non-nationals on the grounds of residency.

An ethnic nationalist model of membership does not therefore resolve the constitutional tensions arising from the disjuncture between national and European models of democratic inclusion. Ethnic nationalism is not the only nationalist model of democratic inclusion that has been advanced: a liberal nationalist model has been favoured by David Miller, who suggests that allowing immigrants to embark upon a path to naturalisation, treating them as “citizens in the making” enables states to steer a mid-course between the conflicting right of individual free movement and the right of states to control their borders.<sup>49</sup> However, even a nationalist model that couples democratic inclusion with open paths to citizenship acquisition fails to resolve our problem of constitutional conflict, as it leaves little room for the enfranchisement of resident non-nationals, notwithstanding that they may share in a common European citizenship. Membership models that are anchored to nationalism as a reference point therefore perpetuate the constitutional tensions highlighted in the previous section through delineating the boundaries of democratic inclusion in a way that is incompatible with the development of a European franchise right.

ii. Affected interests

The affected interests principle of membership considers any person who is affected by a governmental decision to be entitled to representation as a member of the political community. The principle has a variety of different interpretations, with different forms of being affected giving rise to a claim for political representation. The theory of affected interests has been advocated by Robert Goodin as a principle by which to constitute the demos so as to “include all interests that are actually affected by the actual decision”.<sup>50</sup> The affected interests theory has also been defended by Ludvig Beckman specifically within the context of a claim to

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<sup>49</sup> D. Miller, “Immigrants, Nations and Citizenship”, (2008) 16 *The Journal of Political Philosophy* 371-390 at 390

<sup>50</sup> R. Goodin, “Enfranchising All Affected Interests, and Its Alternatives”, (2007) 35 *Philosophy and Public Affairs* 40-68 at 52.

enfranchisement by resident non-nationals,<sup>51</sup> illustrating the strong claim to more inclusive democratic rights asserted by this membership model.

The broadest interpretation of the affected interests principle is simply that anyone who is affected in any way is entitled to representation, irrespective of whether they are bound by the decision. This seems to be the interpretation assumed by Bauböck, who uses an example of a nuclear power plant giving rise to a claim to political participation across national borders as a means of illustrating how a person might be affected but not bound by governmental decisions.<sup>52</sup> This interpretation of the affected interests model allows unlimited potential for franchise claims, restricted neither by nationality nor residence.

Alternative interpretations of the affected interests principle can arise through according a specific meanings to “interest”. One possibility is to interpret the “interest” affected as a legal interest. The membership model therefore encompasses those who are subject to the laws of a country. This interpretation moves away from a non-territorial perception theory and results in membership being defined by the borders of the jurisdiction of each country. However, this interpretation of affected interests risks becoming merely a proxy for presence within the territory and therefore including all transient members within the bounds of political inclusion. As the first interpretation was over-inclusive outside of the territory, this interpretation may be over-inclusive within the territory. This objection can be counteracted by limiting application of the principle to those who are routinely or habitually subject to law, or who use the law as a basis to inform life decisions.

Another specific meaning that could be attributed to the affected interests principle could be to refer to a financial interest. Affected interests in this sense correspond with the principle of contributivism, which is based upon economic remittances to government “buying” a franchise right. A theory of membership based upon financial contribution would have the effect of enfranchising all resident non-nationals on the basis of their tax contribution. Criticisms of the affected interests model have

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<sup>51</sup> L. Beckman, “Enfranchising Citizenship and Voting Rights: Should Resident Aliens Vote?”, (2006) 10 *Citizenship Studies* 153 – 165.

<sup>52</sup> R. Bauböck, “Stakeholder Citizenship and Transnational Political Participation: A normative evaluation of external voting”, (2007) 75 *Fordham Law Review* 2393-2447 at 2420.

focussed upon the breadth of its scope, which results in an over-inclusive model of membership. Globalisation means that everyone in the world is potentially affected in some way by governmental decisions, and even a tenuous link would give rise to a claim for political representation. Thus Goodin concedes that “understood in a suitably expansive ‘possibilistic’ way, that would mean giving virtually everyone everywhere a vote on virtually everything decided anywhere”.<sup>53</sup> Whilst Goodin acknowledges that such an imperative may not be practical, he maintains that principles of democracy require those whose interests are affected to be either enfranchised or compensated.<sup>54</sup>

A second problem associated with the operation of a membership model based upon affected interests is that it requires the boundaries of political inclusion to be re-defined in accordance with those affected by each decision made, resulting in the demos being “defined decision by decision rather than people by people”.<sup>55</sup> This is clearly a problematic interpretation, both because of the logistical difficulty in ascertaining those whose interests will be sufficiently affected by each decision, and by the fact that the demos is not directly involved in individual decision making as this task is delegated by them to legislators.<sup>56</sup>

These criticisms highlight the objection that affected interests would constitute too indeterminate a principle by which to resolve tensions within national policies resulting from tensions between national and European citizenship models. Delineating the boundaries of the demos according to the principle of affected interests may hold normative appeal for those who advocate greater democratic inclusion that is detached from nationality, but nevertheless is not a feasible model upon which to build national constitutional principles.

### iii. Stakeholder

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<sup>53</sup> R. Goodin, “Enfranchising All Affected Interests, and Its Alternatives”, (2007) 35 *Philosophy and Public Affairs* 40-68 at 68.

<sup>54</sup> Ibid.

<sup>55</sup> Shapiro (2003) *The Moral Foundations of Politics* cited in R. Bauböck, “Stakeholder Citizenship and Transnational Political Participation: A normative evaluation of external voting”, (2007) 75 *Fordham Law Review* 2393-2447 at 2420.

<sup>56</sup> R. Bauböck, “Stakeholder Citizenship and Transnational Political Participation: A normative evaluation of external voting”, (2007) 75 *Fordham Law Review* 2393-2447 at 2420.

Stakeholder citizenship is a theory of political membership that has been advanced by Bauböck, which builds upon and refines elements of the affected interests model. Bauböck criticises the principle of affected interests for being “too vague and broad for determining membership in a demos”.<sup>57</sup> He suggests that the interest necessary to define membership is not an interest in specific decisions and nor is it founded upon subjection to law or financial contribution. Rather, the interest giving rise to a claim of political membership is an interest in membership itself, and the rights attached to this status.<sup>58</sup> Bauböck therefore presents a model of citizenship as “stakeholding in a self-governing polity”, where an “interest in membership arises from a person’s future well-being being linked to the flourishing of a particular polity by the circumstances of their life”.<sup>59</sup> The interest in citizenship is therefore not purely subjective, but is based upon the fulfilment of two criteria: the individual must rely on the community for the protection of their basic rights (“dependency criterion”), and the individual must be, have been or will be subject to that community’s political authorities for a significant period over the course of their lives (“bibliographical subjection criterion”).<sup>60</sup>

The stakeholder theory of membership advocates the enfranchisement of all permanently resident non-nationals, who will fulfil both criterion one and two by virtue of their permanent residence. Transient visitors are excluded from this model of membership: their temporary residence is insufficient to fulfil the criteria and tie their future well being to the flourishing of the polity. Unlike Ruth Rubio-Marín’s theory (see below), Bauböck does not advocate the automatic acquisition of citizenship status after a significant period of residency. Stakeholder citizenship can therefore be interpreted in one of two ways: fulfilment of the two criteria can give rise to a right to citizenship status (which must be applied for), or can give rise to citizenship rights. The former interpretation precludes the enfranchisement of long-term resident non-nationals, on the grounds that franchise rights attach to the citizenship status available

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<sup>57</sup> R. Bauböck, “Stakeholder Citizenship”, above n.56 at 2421.

<sup>58</sup> R. Bauböck, “Global Justice”, above n.7 at 21.

<sup>59</sup> R. Bauböck, “Stakeholder Citizenship”, above n.56 at 2422

<sup>60</sup> R. Bauböck, “Global Justice”, above n. 7 at 21; R. Bauböck, “Political Ethics of External Citizenship”, Paper Presented at American Political Science Association Annual Conference, Chicago, 30 August 2007; available from [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/2/0/9/5/6/pages209563/p209563-5.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/2/0/9/5/6/pages209563/p209563-5.php), at 5.



to them through naturalisation.<sup>61</sup> However, the latter interpretation would mean that although not legal citizens, long-term residents are entitled to enfranchisement due to their status as stakeholders.

In addition to advocating greater political rights for resident non-nationals, Bauböck's stakeholder theory of membership advocates more liberal immigration policies than currently applied by Member States to non-EU nationals. In an attempt to reconcile the apparently competing liberal stances of national self-determination and individual freedom of movement, Bauböck suggests that the stakeholder principle "provides a mediating principle that shrinks the area of moral uncertainty about the allocation of admission duties to states and reinforces the two other reasons [individual autonomy and remedial justice] for making liberal states much more open for immigration than they currently are."<sup>62</sup> The stakeholder theory of membership therefore not only succeeds in posing a franchise model that is capable of coherently encompassing Article 19 EC voting rights, but also reconciles tensions between restrictive national immigration criteria and the European right of free movement granted to EU citizens and their non-EU national family members.<sup>63</sup>

The stakeholder model of membership is thus successful in addressing the tensions that arise from the operation of European citizenship within a national constitutional framework. The theory is able to provide a coherent normative model within which Article 19 EC voting rights can operate according to the consistent classification of resident non-nationals as stakeholders. However, the application of Bauböck's theory within the context of the European Union could face the criticism that the stakeholder principle pays insufficient attention to the question of "what polity does the individual have a stake in?" that necessarily arises in the context of composite polities. Bauböck does indeed consider the application of stakeholdership to the European Union, and justifies the operation of European citizenship franchise rights as arising from the fact that "stakeholders in Member States are simultaneously stakeholders in the Union and have an interest in democratic accountability of the supranational institutions as well

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<sup>61</sup> J. Shaw, *The Transformation of Citizenship in the European Union*, Cambridge, 2007

<sup>62</sup> R. Bauböck, "Global Justice", above n.7 at 28

<sup>63</sup> See also A. Lansbergen, "Testing the Limits of European Citizenship", Federal Trust Policy Brief; available from [www.fedtrust.co.uk/admin/uploads/Testing\\_Limits\\_of\\_Citz.pdf](http://www.fedtrust.co.uk/admin/uploads/Testing_Limits_of_Citz.pdf)

as in the protection of their rights as Union citizens in all Member States.”<sup>64</sup>

Conversely, Bauböck argues that membership in substate polities is “automatically acquired and lost with a shift of residence.”<sup>65</sup> Unlike Dora Kostakopoulou’s a-national model of membership, Bauböck’s model therefore presumes the anchoring of stakeholdership to participation within a national polity: stakeholding within the Union is derived from stakeholding within a Member State, and stakeholding within a sub-national polity is secondary and less permanent than national membership. Whilst this relationship may be a logical presumption derived from the formulation of European citizenship as the aggregate body of nationals of Member States, it is questionable whether a de-nationalised conception of stakeholdership (for example, operating at the local or supranational level) might be more successful in resolving constitutional tensions between national and European practices.

#### iv. “Social Membership” and Domicile

“Social membership” is a model of inclusion advanced by Ruth Rubio-Marín. Like all of the theories above, it claims that all those who are members of a society have a right to political representation within it. Membership within a community as a claim for political representation is a premise common to all the theories examined above, which differ only in delineating the criteria for social membership. An ethnic nationalist model considers that membership within a society is attained through common descent, whilst a legal affected interests model views all those who are subject to state jurisdiction as part of a community.

The point of divergence of this theory from the common position shared by all is Rubio-Marín’s assertion that membership within a society is a “social fact”.<sup>66</sup> She outlines two conditions which denote social membership: “long term subjection to the collectively binding decisions adopted in a polity” and “dependency on a given framework associated with permanent residence”.<sup>67</sup> Permanent residence refers to the combination of habitual residence and “other indications of ties between the person and the place of her residence, such as the work and professional or school environment, the possession of property, the contribution to and the reliance on social

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<sup>64</sup> R. Bauböck, “Global Justice”, above n.7 at 24.

<sup>65</sup> R. Bauböck, “Stakeholder Citizenship”, above n.56 at 2430.

<sup>66</sup> R. Rubio-Marín, *Immigration as a Democratic Challenge*, Cambridge, 2000.

<sup>67</sup> Ibid.

services, engagement in associations, trade unions and in the cultural life, family and other types of affective ties”.<sup>68</sup> The “factual” element of this residency status is highlighted by Rubio-Marín through a comparison with domicile, a legal status denoting a relationship between the individual and the state. A unique element of Rubio-Marín’s theory is her contention that the presumption of societal membership after a defined period of residence should be such as automatically to confer citizenship status. This means that resident non-nationals would not be entitled to enfranchisement, as they have not yet reached the point at which they are considered automatically to be members of society.

A model of membership that shares similarities with this “social membership” model is advocated by Kostakopoulou in her membership model based upon domicile. The similarities between the theories should not be clouded by the differing use of terminology, particularly the meanings attributed to domicile. Rubio-Marín recalls the distinction drawn by the Committee of Ministers in 1972 and confines domicile to a legal status, in contrast with the factual situation of residence which is based upon extended ties between an individual and the community. In contrast, Kostakopoulou uses the notion of domicile to indicate “the various legal connections *and bonds of association* that a person has with a political community and its legal system” (emphasis added).<sup>69</sup> Kostakopoulou refers to domicile as the idea of a “permanent home”, where an individual makes the country “the hub of his/her interests”.<sup>70</sup> She considers domicile to involve the intention of permanent settlement (i.e. an indefinite period of residence), over the course of which an individual will invariably form ties that link their life interests to the community.

In this sense, both Rubio-Marín and Kostakopoulou base their models of membership upon the combination of permanent residence with wider community ties such as employment and family. Both of these theories therefore support the enfranchisement of all resident non-nationals on the basis of permanent residency and presumed factual integration within society after a length of time (though for Rubio-Marín these people would no longer be non-nationals after the requisite period of time due to a preferred

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<sup>68</sup> Ibid.

<sup>69</sup> D. Kostakopoulou, *The Future Governance of Citizenship*, Law in Context Series, Cambridge, 2008.

<sup>70</sup> Ibid.

model of automatic naturalisation). Furthermore, the models advanced by Rubio-Marín and Kostakopoulou are both a-national models of citizenship. These models remain inextricably linked to territoriality in that they are defined in part by residence or ties to a specific place, a relationship defended by Kostakopoulou on the grounds that “statal institutional arrangements are not only crucial to enforcing rights and obligations associated with citizenship, but they are also the arenas within which redistributive policies, comprehensive rights protection, elections, citizens exchanges and other forms of political participation can be realised.”<sup>71</sup> Despite the continued reliance on territoriality, these membership models are however not defined through reference to the nation state. Such a-national models of membership have the benefit not only of enhancing the cohesiveness of national membership models in light of the operation of European franchise rights, but also allow more successfully for the nuanced elaboration of citizenship within in nested societies, specifically asymmetric ones such as UK and Belgium.

The preceding classification of membership models has identified several alternative criteria according to which Member States might re-evaluate the boundaries of democratic inclusion in response to the constitutional tensions identified earlier in the paper. The two models most capable of mitigating the challenge of incoherent policy caused by the operation of European citizenship rights within a mal-adjusted national framework are Bauböck’s stakeholder model and the social membership/domicile theory advanced by Rubio-Marín and Kostakopoulou. The latter theory is one of a-national citizenship, that shifts the focus of citizenship to the local level: any person who is a member of a European society is a member of European Society. A model grounded in local membership removes not only the problem of privileged voting rights for 2<sup>nd</sup> country nationals, but also creates an equality that extends beyond the narrow context of European integration to include 3<sup>rd</sup> country nationals. It also has the benefit of allowing for multiple identities within a unified system. A European citizen is foremost a member of local society, and secondly part of a collective European society based upon domicile within the Union. The fostering of multiple identities and

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<sup>71</sup> D. Kostakopoulou, “Citizenship Goes Public: The Institutional Design of Anational Citizenship”, (2008) *Journal of Political Philosophy* 1-30 at 28.

loyalties that this model will achieve has the benefit of ensuring the stability of societies within a multi-level framework.<sup>72</sup>

Both of the membership models identified advocate a substantial expansion of political rights, not only across the breadth of people who are eligible for enfranchisement (ie to include resident non-nationals even if they are nationals of a non-EU country), but also across levels of political representation. The models advanced do not justify the restriction of resident non-national franchise to the municipal level, but rather provide strong arguments for extension of the franchise in general elections to those who it is argued belong within the boundaries of the demos. Reform of national constitutional practice in either of these directions may be unlikely, and even a constitutional impossibility for some Member States.<sup>73</sup> Nevertheless, the illustrated tension between European citizenship practice and national constitutional frameworks lend legitimacy to the continued search for coherent models according to which states can strengthen national democratic principles.

#### **IV Conclusions**

In this article we have considered the implementation of Article 19 EC voting provisions as a specific example illustrative of the reflexive relationship between the development of a European model of citizenship and the adaptation of national constitutional discourses. Through the lens of electoral rights we have embarked upon a process of re-rooting aspects of the European citizenship discourse within the national constitutional framework of Member States, thus breaking free of the analytical limits of EU citizenship as an adjunct to European integration. The process of contextualizing the discourse surrounding European citizenship against national constitutional principles not only allows for a more multifaceted understanding of the nuanced operation of European citizenship across the multi-level Euro polity, but also highlights the implications for national constitutional models that struggle to accommodate the required changes.

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<sup>72</sup> J. Shaw, “*Citizenship of the Union: Towards Post-National Membership?*”, (1997) Jean Monnet Working Paper 6/97; available at <http://www.jeanmonnetprogram.org/papers/97/97-06-.html>.

<sup>73</sup> See above at n.24.

In two interwoven sections we have explored the constitutional ramifications of Art 19 EC for Member States, drawing examples from the constitutional reforms necessitated in Germany and Ireland in particular (in the latter case to accommodate UK citizens' electoral rights), and have attempted to illustrate a number of possibilities for reform of national membership models according to a cohesive and defensible policy as demanded by liberal democratic principles. The most defensible of such models are those capable of minimizing the tensions between national constitutional practice and European citizenship, and suggest in practice a need to grant greater franchise rights to resident non-nationals than any Member State currently allows.